Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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Nos. ~~83-176 and~~ 83-5195

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS HERRMANN, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE ENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the warrantless nighttime boarding of their vessel by Coast Guard officers violated their Fourth Amendment rights because the boarding was not based on reasonable suspicion or probable cause. They also argue that the court of appeals should have reached their sufficiency of the evidence claim even though they did not raise it in the trial court.

1. After a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioners were convicted on one count of importing marijuana (21 U.S.C. 952); one count of conspiring to commit that offense (21 U.S.C. 963); one count of possessing marijuana with intent to distribute it (21 U.S.C. 841(a)(1)); and one count of conspiring to do so (21 U.S.C. 846).[1] Petitioner Herrmann was sentenced to four concurrent terms of two years' imprisonment, to be followed by a two-year special parole term. Petitioner Ennis was sentenced to four concurrent terms of three years' imprisonment, all but six months of which were suspended in favor of probation. He also received a two-year special parole term. The court of appeals affirmed (Pet. App. 41-58).[2]

a. The evidence at the suppression hearing showed that on the evening of December 18, 1980, petitioners' sailing vessel, the Reverie, was discovered to be smuggling some 4,000 pounds of marijuana into this country from Costa Rica. Acting pursuant to a recently issued Coast Guard operations order, a Coast Guard vessel approached and boarded the Reverie to check its documentation. In the course of that boarding, petitioners' illicit cargo was discovered.

On December 5, 1980, the Commander of the Twelfth Coast Guard District issued an operations order that established a schedule of harbor blockades. The Coast Guard group in the Monterey, California area was directed to conduct 12 nighttime blockades at Morro Bay and Monterey Bay between December 12, 1980, and January 12, 1981.

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[1]Co-defendant James Eagon was convicted on the same counts with petitioners, and his conviction likewise was affirmed on appeal. He has not petitioned for a writ of certiorari.

[2]References to "Pet. App." are to the appendix to No. 83-176.

During those blockades, the group was to board and check the documentation of all shorebound vessels that were 200 feet or less in length. Pet. App. 32, 42-43.

One blockade was scheduled for the night of December 18. That evening, Chief Petty Officer David Wickstrom was in command of Coast Guard Vessel 41367, a 41-foot patrol boat. At about 10:45 p.m., Wickstrom and his crew attempted to rendezvous with a larger Coast Guard vessel. When they failed to locate that vessel, the 41367 headed north along the California coast toward Santa Cruz. Radar revealed a large vessel that Wickstrom assumed to be the second Coast Guard ship. A second, smaller "blip" then appeared on the radar. The 41367 soon sighted that craft, which sharply altered its course when it neared the Coast Guard boat. Pet. App. 33-34, 43-44. The 41367 then approached the larger vessel and discovered that it was not a Coast Guard ship but rather was the Reverie. The Reverie was stationary; its lights were off; its hatches were open; and fenders were hanging over the side. As the 41367 approached, the Reverie turned on its lights and began to move toward shore. *Id.* at 34-35, 44. The 41367 directed the Reverie to heave to, and Wickstrom boarded to verify the ship's compliance with documentation and safety regulations, as directed by the operations order (*id.* at 45). Once aboard, Wickstrom looked through an open hatch and saw several bales that were wrapped in burlap and appeared to contain marijuana. A later search revealed some 4,000 pounds of marijuana, along with petitioners' passports and a receipt for the illicit cargo (*id.* at 35, 45). Petitioners were then arrested.

b. Prior to trial, petitioners moved to suppress the items discovered as a result of the boarding. Before the district court, and again on appeal, they argued that the boarding violated *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979), because it occurred at night. Both courts below

rejected this claim, distinguishing *Piner* on the ground that the boarding here was not random but rather was made pursuant to an administrative directive (Pet. App. 38-39, 46-51). Judge Boochever concurred and additionally was of the view that the boarding was based on reasonable suspicion of criminal activity (*id.* at 55-58).

2. Petitioners contend (83-176 Pet. 11-25; 83-5195 Pet. 7-11) that the warrantless boarding of their vessel at night, without any founded suspicion of criminal activity, violated their Fourth Amendment rights. However, this Court's decision in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), which approved suspicionless boardings of vessels for documentation inspections, puts to rest petitioners' claims.

In *Villamonte-Marquez*, the Court approved the Customs Service's powers, under 19 U.S.C. 1581(a) and 46 U.S.C. 277, to make suspicionless boardings of vessels in inland waters to check for compliance with documentation laws. There is no reason why the same rule should not apply here: indeed, there is even greater justification for applying it to a boarding of a shorebound vessel in territorial waters. See *Villamonte-Marquez*, slip op. 6 n.4. The fact that the Coast Guard, rather than the Customs Service as in *Villamonte-Marquez*, is involved in this case is also immaterial since the Coast Guard's authority under 14 U.S.C. 89(a) is virtually the same as that accorded Customs officials under 19 U.S.C. 1581(a) and stems from the same source. See *Maul* v. *United States*, 274 U.S. 501, 504-507 (1927); *United States* v. *Demanett*, 629 F.2d 862, 866-867 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); *United States* v. *Freeman*, 579 F.2d 942, 946 (5th Cir. 1978).[3] Nor is it

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[3]We also note that, as both the district court and one judge of the court of appeals found (Pet. App. 37-38, 58), Officer Wickstrom possessed reasonable suspicion for boarding the Reverie. When the Coast Guard patrol boat approached, the Reverie was stationary

significant that the boarding here occurred at night. The statute does not limit boarding authority to daytime, and surreptitious violations of navigation and border laws are, if anything, more likely to occur at night. As the court below recognized (Pet. App. 49-50), there were no less instrusive means available to the Coast Guard, and (while we do not believe this was necessary to sustain its coinstitutionality) the boarding was conducted under an administrative plan that left the Coast Guard officers no discretion as to what boats were to be stopped and boarded. See *United States* v. *Watson*, 678 F.2d 765, 773 (9th Cir.), cert. denied, No. 82-555 (Nov. 29, 1982). Accordingly, further review is unwarranted.[4]

3. Petitioners also argue (83-176 Pet. 25-29; 83-5195 Pet. 7 & n.1) that there was insufficient evidence to support their convictions.

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and had no lights on, yet its fenders were down and its hatches were open as if it had just rendezvoused with the small craft that the Coast Guard boat had seen. When the patrol boat approached, the Reverie turned on its lights and began to move toward shore. These circumstances were certainly sufficient to lead an experienced officer to suspect that criminal activity was afoot.

[4]Petitioners claim (83-176 Pet. 14-15) that the boarding was illegal because the documentation inspection was a pretext for a criminal investigation. However, *Villamonte-Marquez* rejected the argument that the boarding officers' motivation may undermine an otherwise valid boarding and document check (slip op. 4-5 n.3).

Petitioners also contend (83-176 Pet. 28-29) that the court below should have decided whether an administrative warrant was required for the boarding here and whether a search warrant was required for the subsequent search. But the claim that an administrative warrant is needed in a case such as this was raised in *Villamonte-Marquez* (see 81-1350, Resp. Br. 36-37), and implicitly rejected by the Court. See slip op. 15 n.10 (Brennan, J., dissenting). In addition, the court of appeals implicitly rejected petitioners' claim when it held, under its own precedents, that the carefully drafted administrative standards here were sufficient to remove any improper discretion from the executing officer.

As previously noted, petitioners were arrested aboard the Reverie, which was laden with some 4,000 pounds of marijuana. Also seized from the vessel were a receipt for the illegal cargo and documents showing that petitioners had recently left Costa Rica. In district court, petitioners did not contest the sufficiency of the evidence against them. Instead, after their suppression motions were denied, they agreed to be tried on stipulated facts so that they could preserve their right to appeal their Fourth Amendment claims. In the court of appeals, they argued for the first time that the stipulated facts were insufficient because the stipulation did not "explicitly state that the three appellants constituted the *Reverie's* crew and were present on board when the vessel was boarded" (Pet. App. 52). The court of appeals declined to review petitioners' claim, since they had not raised it before the trial court.

Petitioners renew their objection before this Court, but their argument is insubstantial. First, it is by no means clear that the stipulation fails to establish their presence on the Reverie. For example, the stipulation stated (para. 6) that witnesses from the Coast Guard vessels would testify to their observations during the stop of the reverie. That testimony unquestionably would have identified petitioners and co-defendant Eagon as the members of the boat's three-man crew. Moreover, as the court of appeals held, petitioners' agreement to proceed by stipulation, combined with their failure to raise their present objection in district court, barred them from raising it on appeal. The plain error rule (Fed. R. Crim. P. 52 (b)) "was intended to afford a means for the prompt redress of miscarriages of justice" and applies only where the trial is "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Here,

since there is not the slightest doubt that petitioners were present on the vessel, any defect in the stipulation does not constitute plain error. To recognize a "plain error" in such circumstances would create, not redress, a miscarriage of justice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1983

DOJ-1983-11